Office Supreme Court, U.S.
FILED
MAY 5 1964
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 1070

CARLOS MARCELLO, *Petitioner*,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JACK WASSERMAN,
DAVID CARLINER,
Warner Building,
Washington, D. C.
MICHEL A. MAROUN,
Sklar Building,
Shreveport, Louisiana.
G. WRAY GILL,
Pere Marquette Building,
New Orleans, Louisiana.
Attorneys for Petitioner.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement	2
Reasons for Granting the Writ	5
Conclusion	18

CITATIONS

Cases:

Banks v. *United States*, 249 F. 2d 672, 674 (9th Cir., 1957)	6
Baumgartner v. *United States*, 322 U.S. 665, 671 (1943)	10
California Fruit Exchange v. *Henry*, 89 F. Supp. 580, 586-7 (W.D. Pa., 1950), aff'd. 184 F. 2d 517	16
Chapman v. *United States*, 247 F. 2d 879, 881 (6th Cir., 1957)	11
Commercial Standard Ins. Co. v. *Gordon's Transports*, 154 F. 2d 390, 394 (6th Cir., 1946)	16
Cook v. *Swope*, 109 F. 2d 955 (9th Cir., 1940)	15
Cudiff v. *Nicholson*, 107 F. 2d 162 (4th Cir., 1939)	8
Hamwood v. *United States*, 127 F. Supp. 485, 488 (S.D. N.Y., 1954)	6, 9
Johnson v. *Zerbst*, 304 U.S. 458 (1938)	17
Marcello v. *Bonds*, 349 U.S. 302 (1955)	3
Marcello v. *Kennedy*, 312 F. 2d 874 (D.C. Cir., 1962)	3
Matter of Bonjinoff v. *People*, 299 N.Y. 145, 156, 85 N.E. 2d 909 (1949)	16
McKinney v. *United States*, 208 F. 2d 844, 846-7 (D.C. Cir., 1953)	8
Myron v. *United States*, 214 F. 2d 364 (5th Cir., 1954)	6
Moore v. *Michigan*, 355 U.S. 161 (1957)	8
Mutual Life Ins. Co. of N.Y. v. *Tormollen*, 118 F. 2d 163, 166 (7th Cir., 1941)	14
O'Keith v. *Johnston*, 129 F. 2d 889 (9th Cir., 1942), cert. denied 317 U.S. 680	8

	Page
Pennsylvania R. Co. v. *Chamberlain*, 288 U.S. 333, 340 (1933)	14
People v. *Graves*, 206 N.Y. Supp. 2d 433, 11 A.D. 2d 1080 (1960)	11
Putnam v. *Moore*, 119 F. 2d 246, 248 (5th Cir., 1941)	12
Rice v. *Olson*, 324 U.S. 786 (1945)	7
Sherman v. *United States*, 356 U.S. at 378 (1958)	7
Sorrells v. *United States*, 287 U.S. 435, 457 (1932)	7
Thalenhorst v. *United States*, 119 F. 2d 567, 571 (10th Cir., 1941)	14
United States v. *Echols*, 253 Fed. 862 (S.D. Texas, 1918)	7
United States v. *Healy*, 202 Fed. 349 (D. Mont., 1913)	7
United States v. *Lister*, 247 F. 2d 496 (2d Cir., 1957)	17
United States v. *Marcello*, 202 F. Supp. 694, 697, note 6 (1962)	4, 6
United States v. *Morgan*, 346 U.S. 502, 512 (1954)	8
United States v. *Morgan*, 222 F. 2d 673 (2d Cir., 1955)	9
United States v. *Tribote*, 297 F. 2d 598 (2d Cir., 1961)	17
Walker v. *Johnston*, 312 U.S. 275 (1941)	7, 8, 15, 17
Wilson Distilling Co. v. *Faust Distilling Co.*, 60 F. Supp. 373, 375 (M.D. Pa., 1945)	16
Yiannopoulos v. *Robinson*, 247 F. 2d 655, 657 (7th Cir., 1957)	10

Statutes and Regulations:

United States Code:

26 U.S.C. 1399(e)	3
26 U.S.C. 1399(g)	3
28 U.S.C. 1254(1)	2
28 U.S.C. 1651(a)	2
Rule 5, United States District Court, Eastern District of Louisiana	13

Miscellaneous:

Department of Justice Circular Letter No. 3141, August 1, 1938	15

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963

No.

CARLOS MARCELLO, *Petitioner*,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming a denial of a petition in the nature of a writ of coram nobis to set aside petitioner's conviction which furnishes a basis for his deportation.

Opinions Below

The opinion of the Court of Appeals is reported at 328 F. 2d 961 and is set forth in the Appendix at pp. 31-32. The District Court's opinion and decree is reported at 210 F. Supp. 892 and is set forth in the Appendix at pp. 19-30.

Jurisdiction

The judgment of the Court of Appeals was entered on March 12, 1964. By order of Mr. Justice Black, the time for the petitioner to file his petition was extended to May

11, 1964. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the issue of entrapment can be raised in a coram nobis or post conviction proceeding or whether it is precluded by a guilty plea.

2. Whether the burden of proof in a coram nobis proceeding is "affected and magnified by lapse of time" and whether such lapse of time or laches can be utilized to discredit petitioner's case.

3. Whether a judgment of conviction filed on October 28, 1938, one day before the date of its rendition (October 29, 1938) can be accorded a strong presumption of regularity where there is no finding that the filing date was erroneous.

4. Whether petitioner was afforded a fair hearing upon his coram nobis application where the District Court gave conclusive weight to an exhibit (Government's Exhibit 18) which was not introduced in evidence, to office practice of short and uncertain duration, and to inadmissible opinion evidence.

Statute Involved

Section 1651(a) of 28 U. S. C. provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Statement

Petitioner, a fifty-four-year-old native of Tunis, who came to the United States at the age of eight months, was re-

moved illegally to Guatemala for a brief period[1] and is again the subject of deportation proceedings upon the basis of an unusual conviction. On October 29, 1938, he was sentenced in the United States District Court for the Eastern District of Louisiana to a year and a day for transferring marihuana to one Gilmore Failor, a Government agent, in violation of 26 U. S. C. 1399(c) and (g) (R. 6-9). The judgment of conviction is dated on a Saturday, October 29, 1938, and recites that petitioner appeared on that date by counsel. However, the judgment bears a filing date of the day before, October 28, 1938, in the handwriting of Deputy Clerk Lewis who certified it as a true copy on October 29, 1938 (R. 6-7). No finding was made herein that the filing date was erroneous.

Application was made by petitioner in the United States District Court for the Eastern District of Louisiana on

---

[1] Petitioner's deportability was sustained by a divided vote of this Court in *Marcello* v. *Bonds*, 349 U.S. 302 (1955). Despite the acknowledgment in that case and in all other judicial and administrative proceedings that Marcello was born in Tunis, the Department of Justice fraudulently represented to Guatemala that Marcello was a native and citizen of Guatemala, secured a reentry permit from Guatemala reciting such facts, and deported Marcello to Guatemala on April 4, 1961. Subsequently, Guatemala expelled Marcello upon the ground that he was not entitled to enter that country. After being kept for five days incommunicado in San Salvador, Marcello made his way back here, around June of 1961. He is under indictment for this return to the United States. See *Marcello* v. *Kennedy*, 312 F. 2d 874 (D.C. Cir., 1962).

The Government, and in particular the Immigration Service was well aware that Marcello was not a native or citizen of Guatemala at the time he was hurriedly removed there. One Carl Noll, for whose truthfulness the Government vouches, and who has been utilized as a Government witness in at least two recent conspiracy prosecutions, advised the Immigration Service on January 6 and 7, 1960, that he, Carl Noll, arranged for the creation of a false Guatemalan birth certificate in Marcello's name. This forgery was knowingly utilized by the Department of Justice to deport Marcello to Guatemala.

In June of 1961 a second deportation proceeding was instituted against Marcello upon the basis of his 1938 marihuana conviction (R. 10).

September 5, 1961 (R. i), after his return from Guatemala and the institution of a second deportation proceeding, for relief in the nature of a writ of coram nobis to set aside his 1938 conviction. Petitioner asserted that he was entrapped into making a transfer to a Government agent, Gilmore Failor (R. 8-9). The District Court ruled that petitioner was precluded from raising this issue by reason of his guilty plea and no evidence was taken thereon. *United States* v. *Marcello*, 202 F. Supp. 694, 697, note 6 (1962). The only issue tried below was whether petitioner was represented by an attorney, Warren O. Coleman (now deceased), on the date of his guilty plea and sentence.

Petitioner was indicted on April 25, 1938, entered a plea of not guilty on May 2, 1938, and his case was thereafter postponed indefinitely on motion of the Government (R. i). He testified that thereafter he changed his plea to guilty because he had no money to fight the case (R. 345) and that he appeared in Court to so plead accompanied by his brother-in-law and one Jerry Wood (R. 181, 308-9). He had no attorney nor was he advised of his right to counsel (R. 309, 347). Jerry Wood, who knew attorney Warren O. Coleman, testified that Coleman was not in Court on the day Marcello pleaded guilty (R. 182, 302-3).[2] Paul Seidler, Chief Probation and Parole Officer of the District Court at the time, likewise confirmed the absence of any attorney at the time of the sentence (R. 172-5, 281).

The Government's main witness in opposition to the application was Judge J. Skelly Wright who testified that he was an Assistant United States Attorney in 1938 and was in charge of this case. He had, however, no independent recollection of the case or of the sentencing of Marcello on October 29, 1938 (R. 413-5). He identified

[2] It was stipulated by the parties that no stenographic record was made or kept of the proceedings of October 29, 1938 (R. 176-6).

Government Exhibit 18 a parole report dated October 29, 1938, but again acknowledged that he had no independent recollection of having prepared it (R. 414). On the basis of Exhibit 18, which states that Warren O. Coleman was defense attorney, and over objections, Judge Wright gave opinion testimony that Marcello was represented by Warren O. Coleman on the date involved herein (R. 415-7).

Upon cross-examination Judge Wright acknowledged that Exhibit 18 does not in terms show that Marcello changed his plea to guilty, nor that Warren O. Coleman appeared on October 29, 1938 (R. 425, 432). Exhibit 18 (R. 140) was not introduced in evidence, but only marked for identification (R. 413). The District Court ruled that Exhibit 18, together with Judge Wright's testimony as to the practice of his office "conclusively shows that Warren O. Coleman was present with Marcello as his counsel at the time of sentence" (R. 28). He also held that the burden of proof was "affected and magnified by the lapse of time" (R. 28), and that Marcello's testimony was discredited *inter alia*, because of his alleged long period of silence (R. 21). Without any reference to the filing date of October 28, 1938, the District Court concluded that petitioner had not overcome the strong presumption of regularity of the judgment of October 29, 1938 (R. 29). The Court of Appeals affirmed, stating that the District Court had applied the proper burden of proof and that all remaining issues related to credibility.

Reasons for Granting the Writ

The decision below raises important issues as to the nature of the defense of entrapment and whether such defense may be raised as a post conviction proceeding or whether it is barred by a guilty plea. It presents issues of recurring significance in coram nobis proceedings as to whether laches or lapse of time may affect the burden of

proof and credibility and "in effect make a dead letter of the ancient writ." *Hancock* v. *United States*, 127 F. Supp. 485, 488 (S.D. N.Y., 1954). Whether a judgment of conviction filed the day before it was pronounced may be given a strong presumption of regularity and be supported by an exhibit (Government's Exhibit 18) not received in evidence poses a problem in the administration of justice with which this Court should be concerned. This is especially so, when the judgment is being utilized to exile a fifty-four-year-old resident of the United States and separate him from his American citizen wife, four American born children, his mother, six American born brothers and two American born sisters.

1. The District Court refused to consider petitioner's claim of entrapment upon the ground that: "Entrapment would not be meritorious in view of his plea of guilty. *Ellison* v. *United States*, 10 Cir., 1960, 283 F. 2d 489; *Kaye* v. *United States*, 6 Cir., 1956, 235 F. 2d 187". *United States* v. *Marcello*, 202 F. Supp. at 697, note 6 (E.D. La., 1962).

This approach and that of the Fifth Circuit in *Mixon* v. *United States*, 214 F. 2d 364 (5th Cir., 1954), is that entrapment may not be raised in a post conviction proceeding.

To the contrary is *Banks* v. *United States*, 249 F. 2d 672, 674 (9th Cir., 1957), which declares that a conviction procured by entrapment:

> "is in violation of the due process provision of the Fifth Amendment and hence the contentions of the server of the sentence are within the Court's jurisdiction in a section 2255 proceeding."

This conflict between the circuits confirms the view of Justice Frankfurter (joined by Justices Douglas, Harlan

and Brennan) that the basis of the defense of entrapment is as much in doubt today as it was 40 years ago. *Sherman* v. *United States*, 356 U.S. at 378 (1958).

In *Sorrells* v. *United States*, 287 U.S. 435, 457 (1932), Justice Roberts (joined by Justices Brandeis and Stone), said:

> "The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention. Quite properly it may discharge the prisoner upon a writ of habeas corpus. Equally well it may quash the indictment or entertain and try a plea in bar. But its powers do not end there. Proof of entrapment, at any stage of the case requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty."

United States v. *Echols*, 253 Fed. 862 (S.D. Texas, 1918) was an entrapment case where the Court refused to accept a guilty plea. In *United States* v. *Heath*, 202 Fed. 349 (D. Mont., 1913), another entrapment case, the Court vacated a judgment upon its own motion and dismissed the indictment.

A plea of guilty does not preclude a claim that a defendant has been deprived of his constitutional right to counsel. An intelligent understanding waiver is required. *Walker* v. *Johnston*, 312 U.S. 275 (1941); *Rice* v. *Olson*, 324 U.S. 786 (1945). If a conviction procured by entrapment violates due process, an intelligent and understanding waiver of this constitutional right should be required before denying petitioner the right to raise this issue. A guilty plea

is not such a waiver.[3] If public policy rather than the Constitution is the source of the refusal to convict an entrapped defendant then the issue is presented whether that public policy is strong enough to permit raising of the issue in a coram nobis proceeding to prevent deportation of one who has already served his sentence. In either event, the issue is one which merits this Court's attention.

2. The District Court applied a burden of proof herein contrary to that approved in other circuits. The court below stated that petitioner's burden "was affected and magnified by lapse of time" (R. 18). Moreover, the trial judge discredited his testimony, *inter alia*, because of his alleged long period of silence (R. 21). This is sharp contrast to the views of the Court of Appeals for the District of Columbia and the Second Circuit.

The burden of proving that his constitutional right to counsel was violated was upon petitioner. *United States* v. *Morgan*, 346 U.S. 502, 512 (1954). He was required to prove his case by a preponderance of the evidence. *Moore* v. *Michigan*, 355 U.S. 161 (1957).

McKinney v. *United States*, 208 F. 2d 844, 846-7 (D.C. Cir., 1953) is contrary to the ruling herein. It involved an attempt in 1953 to set aside a 1938 conviction. The claim was made that the appellant was not represented by counsel and the District of Columbia Circuit said:

> "McKinney's present application for relief comes late in the day; he has served some fifteen years in prison. *But tardiness is irrelevant where a constitutional issue is raised* . . ." (Italics supplied)

---

[3] Prior to *Walker* v. *Johnston*, 312 U.S. 275 (1941), it was generally held that a plea of guilty precluded assertion of the claim that an accused had been denied his constitutional right to counsel. *O'Keith* v. *Johnston*, 129 F. 2d 889 (9th Cir., 1942), cert. denied 317 U.S. 680; *Cioffi* v. *Nicholson*, 107 F. 2d 162 (4th Cir., 1939).

United States v. *Morgan*, 222 F. 2d 673 (2d Cir., 1955) is also at odds with the decision below. Morgan was convicted in 1939 but did not file an application for a writ in the nature of coram nobis until 1952. The District Court denied relief because he "had too long slept on his rights" and failed to show his innocence. In reversing, the Court of Appeals observed:

> "The passage of many years does not cure a void conviction. * * * It may be that if a defendant, knowing his right to obtain relief from such a conviction, waited to apply for it until all witnesses other than the defendant have died, he would have a very heavy burden with respect to the facts on which relief must rest. However, we need not here so decide. For here, until February, 1953, when we decided *United States* v. *Morgan*, 2 Cir., 202 F. 2d 67, few lawyers—and surely no laymen like defendant—thought such relief available; and as late as January 4, 1954, four Justices of the Supreme Court believed it was not: see *United States* v. *Morgan*, 346 U.S. 502."

Hagwood v. *United States*, 127 F. Supp. 485, 488 (S.D.N.Y., 1954), presented a coram nobis application to set aside a 1940 conviction. The Court declared:

> "Finally, if laches were to constitute an estoppel or defense, it would in effect make a dead letter of the ancient writ. In most instances where the invalidity of a conviction is asserted on the ground the defendant was deprived of his right to counsel, the facts upon which the infirmity is predicated are in existence and known to the petitioner at or shortly after the entry of the judgment. A defendant is not moved, as this defendant was not, to vacate the allege tainted judg-

ment until its impact has again affected him. . . .
To permit a defense of laches to the writ would, in effect, denude it of one of its essential characteristics —the power to hurdle a time factor."

Until April of 1961, Marcello believed his deportation could not be effectuated. Italy, the only prospective legal receiving country refused acceptance of Marcello. The matter was then in litigation in the Italian courts. Moreover, not until December 20, 1961, was the present outstanding order of deportation entered against petitioner (Tr. 51). In addition, it was not until 1962 that Marcello and his counsel discovered the availability of Chief Probation Officer Seidler as a corroborating witness (R. 271-276).

No evidence has been adduced nor any finding made that petitioner intentionally delayed the institution of this proceeding nor that all witnesses other than Marcello are deceased. See *United States* v. *Morgan*, *supra*. Under the circumstances, it is clear that the Fifth Circuit's decision herein is in conflict with those of the Second and District of Columbia Circuit.

The administration of the proper standard of proof in the federal courts has in the past been a matter of concern to this Court. *Baumgartner* v. *United States*, 322 U.S. 665, 671 (1943). Its proper application in coram nobis cases warrants Supreme Court review.

3. The District Court herein utilized incorrect legal standards in according the judgment of conviction a strong presumption of regularity and in giving conclusive weight to opinion testimony and to an exhibit which was not received in evidence. This precluded a fair hearing on petitioner's coram nobis application. Cf. *Giannopoulos* v. *Robinson*, 247 F. 2d 655, 657 (7th Cir., 1957).

Petitioner claimed and submitted evidence of the Chief

Probation and Parole Officer (R. 172-5, 281), Jerry Wood (R. 182, 302-3), and himself (R. 181, 308-9), that he was not accompanied by counsel when he pleaded guilty on October 29, 1938. The judgment of conviction, Government's Exhibit 18, which was not received in evidence, and the opinion testimony of the Assistant United States Attorney at the time, Judge J. Skelly Wright, were proffered in opposition to this claim.

The evidence adduced herein through handwriting experts and other proofs is undisputed that the judgment of conviction is dated October 29, 1938 (R. 6), but that it contains a filing date of October 28, 1938, in the name and handwriting of Deputy Clerk Lewis (Tr. 26, R. 7). The courts below, however, made no finding as to the filing date herein and in complete disregard of the same accorded the judgment a strong presumption of regularity (R. 29). In so doing, we submit they erred.

We recognize that:

> "The court speaks through the judgment which imports verity when collaterally attacked." *Chapman v. United States*, 247 F. 2d 879, 881 (6th Cir., 1957).

In the instant case the presumption of regularity accompanying the judgment of conviction was destroyed. On its face, the judgment is irregular. If it was filed on October 28, 1938, it was prepared without knowledge of counsel's physical appearance and prior to the events described therein which transpired the next day. On October 29, 1938, Deputy Clerk Lewis certified the judgment as correct, indicating his awareness of that date. It would, therefore, appear that Lewis made no error and that the judgment was in fact prepared on its recorded filing date. This irregularity in the court's records rebuts the presumption of regularity. *People v. Graves*, 206 N.Y. Supp. 2d 433,

11 A.D. 2d 1080 (1960). However, the District Court not only relied upon a strong presumption of regularity but also placed great weight upon an exhibit not received in evidence. The court observed that testimony as to office practice, together with Government's Exhibit 18, "conclusively shows that Warren O. Coleman was present with Marcello as his counsel at the time of sentence" (R. 28).

The parole report, Government's Exhibit 18 (R. 140), was marked for identification (R. 413) but never introduced in evidence. For this reason alone it was error to give conclusive weight to this document.

Judge J. Skelly Wright had no independent recollection of the instant case (R. 24, 413), nor of Government Exhibit 18 (R. 414). He identified Government Exhibit 18, a "Report on Convicted Prisoner by United States Attorney" as a document signed by him on October 29, 1938, and prepared upon the basis of the United States Attorney's file and what happened in the courtroom (R. 414, 425, 436-7). He stated that if he prepared the parole report and judgment "then I had knowledge of the facts contained in them" (R. 424). No testimony was adduced that the report was accurate.

This is a case of past recollection recorded, in view of Judge Wright's lack of independent recollection.

In *Putnam* v. *Moore*, 119 F. 2d 246, 248 (5th Cir., 1941), it was said:

> "The modern doctrine is to permit a witness to testify as to past transactions from a memorandum *that he knows was accurate at the time it was made* although he has no recollection whatever of the original transaction."

Significantly, Judge Wright was never asked to affirm the truth of statements in Government's Exhibit 18 nor did he state that he knew the report to be "accurate at the time it was made." For this reason as well no weight should be accorded the report.

The report does not show that Coleman was present on October 29, 1938, as Judge Wright was forced to admit (R. 425). It merely states, in conformity with Rule 5 of the Eastern District of Louisiana, that Coleman was defense counsel of record.

The report is inaccurate, incomplete and unreliable.

(i) It states Marcello's age as 26 instead of 28.

(ii) The marital status of Marcello is unknown.

(iii) It fails to note that Marcello changed his plea from not guilty to guilty.

(iv) It incorrectly charges marihuana transfers on December 6 and 15, 1938, instead of 1937.

(v) It regards Marcello as a habitual criminal on the basis of one prior conviction (when he was 20 years of age) for which a pardon was granted.

Although Judge Wright had no independent recollection and although the document before him (Exhibit 18) did not so state, he was permitted to testify over objection that

---

* After his appearance on May 2, 1938, when Marcello pleaded not guilty, Warren O. Coleman never filed any formal motion for withdrawal as far as the record and docket entries herein reveal. He, therefore, remained attorney of record and continues to be attorney of record although deceased. The rules of the Eastern District of Louisiana, promulgated on September 1, 1919, and in effect in 1938 provided (R. 451):

"Rule 5. Attorney's Withdrawal from Case. The original pleaders or counsel of record, shall be held at all times to represent the parties for whom they appear in the first instance until by formal motion they shall withdraw from the case and their names are taken off the record as such representatives."

Marcello was represented by counsel at the time he pleaded guilty (R. 416). He was likewise permitted to testify that had Marcello not been represented, he would not have indicated such representation in Exhibit 48 (R. 417).

The function of a witness is to bring facts to the attention of the court and not to testify as to conclusions or give opinions, especially where it pertains to the very issues to be decided by the trier of facts.[5] *Pennsylvania R. Co.* v. *Chamberlain*, 288 U.S. 333, 340 (1933); *Thalenhorst* v. *United States*, 119 F. 2d 567, 571 (10th Cir., 1941); *Mutual Life Ins. Co. of N.Y.* v. *Tormohlen*, 118 F. 2d 163, 166 (7th Cir., 1941).

Judge Wright's testimony as to the practice of his office was given conclusive effect by the District Court (R. 28). The usual practice was not followed herein,[6] and evidence as to practice was not established by showing its nature, duration and regularity.

Judge Wright, who became an Assistant United States Attorney in August, 1937 (R. 434), recognized that he could

---

[5] The vice of the opinion testimony herein is magnified by reason of its source. The opinion of a Court of Appeals Judge expressed before a District Court undoubtedly has most compelling effect. Chief Judge Christenberry of the District Court, who never appeared before the sentencing judge herein (R. 444), was likewise called as a witness to add his official weight to the Government's case.

[6] (i) If custom were observed, defendant would not have pleaded guilty on a Saturday. The custom was then, as now, to set arraignment for Wednesday (R. 251).

(ii) If custom were observed, Marcello would not have appeared before Court of Appeals Judge Foster. Judge Borah was the regularly assigned District Judge (R. 433).

(iii) If custom were followed, we would not be confronted with an October 29, 1938, judgment containing a filing date of October 28, 1938.

(iv) If custom were followed, we doubt if the government would have requested and been granted an indefinite postponement of a criminal case (R. 153), notwithstanding the constitutional guarantee of a speedy trial.

In this case, therefore, it may not be assumed that routine patterns of conduct were followed.

not pinpoint when the practice of his office began. He testified (R. 423):

> "Q. Your practice was in effect similar to the matters dictated by those (Department of Justice) circulars, is that right?
>
> "A. Well, you're getting into an area now that I am not clear on, because of the date problem. I am telling you simply that these are directions from the Department of Justice, and if they were received by the United States Attorney's Office, they would have followed them out, and they would have come to my attention, and I would have followed them."

Johnson v. *Zerbst*, 304 U.S. 458 (1938), was not decided until May 23, 1938. Thereafter, Department of Justice Circular Letter No. 3141 (Government Exhibit 15, R. 137) was mailed to all United States Attorneys on August 1, 1938 (Tr. 289), noting the importance of "appointing counsel in those cases in which the accused is without counsel" or unable to retain counsel", *Walker* v. *Johnston*, 312 U.S. 275 (1941), and the Government's brief therein reveal that the practice in 1938 did not cover cases where, as here, a defendant pleaded guilty.[7]

If the office practice was exemplified by the aforesaid Circular Letter, it did not cover this case and in any event the practice was only several months old on October 29, 1938.

The federal cases receiving evidence of custom require

---

[7] *Cook* v. *Swope*, 109 F. 2d 955 (9th Cir., 1940), involved an accused who pleaded guilty. The Court observed:

> "There is nothing in the law of the land as interpreted by the misread *Johnson* v. *Zerbst* opinion * * * or otherwise, that requires a person free from a disability to have counsel in a United States Court."

exacting proof of regularity of the custom offered as evidence.

In *California Fruit Exchange* v. *Henry*, 89 F. Supp. 580, 586-7 (W.D. Pa., 1950), aff'd. 184 F. 2d 517, the court declared:

> "The existence of a usage or custom can only be proved by numerous instances of actual practices, and not by the opinion of a witness * * *.
>
> "One who would establish a custom or usage has the burden of proving it by evidence so clear, uncontradictory and distinct as to leave no doubt as to its nature and character."

Accord: *Wilson Distilling Co.* v. *Foust Distilling Co.*, 60 F. Supp. 373, 375 (M.D. Pa., 1945).

Commercial Standard Ins. Co. v. *Gordon's Transports*, 154 F. 2d 390, 394 (6th Cir., 1946), states:

> "There can be no doubt of the probative value of a person's habit or custom as showing the doing, on a specific occasion, of the act which is the subject of the habit or custom. 'Sec. 92, Wigmore on Evidence, 3rd Ed.' But as the author points out, 'It is easy to see why, in a given instance, something that may be loosely called habit or custom should be rejected because it may not in fact have a sufficient regularity to make it probable that it would be carried out in every instance or in most instances.'"

Matter of Bonjinoff v. *People*, 299 N.Y. 145, 150, 85 N.E. 2d 909 (1949), is a well known New York coram nobis case which sought to set aside a 1936 conviction. Evidence of custom was likewise adduced. The court noted that this evidence:

> "while not incompetent, constitutes in substance a mere expression of opinion and, in the absence of any reference to the circumstances attending the arraignment of the petitioner, has little or no evidentiary weight and must be disregarded. * * *."

Custom evidence herein does not explain a Saturday arraignment, precisely what occurred before Judge Foster who sentenced Marcello, nor the inscription of an October 28, 1938, filing date on an October 29, 1938, judgment. It does not explain whether defendants who appeared to plead guilty without counsel in 1938 were advised of their right to legal representation.

We cannot assume that a budding custom was followed in 1938 when irregularities in the judgment cast doubt upon it. We cannot assume that a newly formed custom was always followed in 1938 when cases disclose failure to comply with it in 1946 and 1951. *United States* v. *Tribote*, 297 F. 2d 598 (2d Cir., 1961); *United States* v. *Lisker*, 247 F. 2d 496 (2d Cir., 1957). Finally, the dispute as to the meaning and scope of *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), prior to *Walker* v. *Johnston*, 312 U.S. 275 (1941), cast grave doubt as to what precise bounds the custom encompassed in 1938. If admissible, the evidence of custom and practice herein was of little or no probative value. Nevertheless, the District Court was conclusively persuaded by this evidence.

The ruling below according a strong presumption of regularity to the judgment and conclusive weight to practice, to opinion evidence, and to an exhibit which was not accepted in evidence, rides rough shod over accepted rules of evidence and deprived petitioner of a fair hearing upon his coram nobis application. He has not been granted a

due process opportunity to attack a judgment which forms the basis for his proposed expulsion from the United States. This should be a matter of deep concern for this Court.

Conclusion

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be granted

JACK WASSERMAN,
DAVID CARLINER,
Warner Building,
Washington, D. C.

MICHEL A. MAROUN,
Sklar Building,
Shreveport, Louisiana.

G. WRAY GILL,
Pere Marquette Building,
New Orleans, Louisiana.
Attorneys for Petitioner.